IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11/09/2003

CORAM

THE HONOURABLE MR. JUSTICE A. KULASEKARAN

C.R.P. (NPD) No. 1250 of 2003
and
C.M.P. No. 13716 of 2003

1. Duraikannu
2. Meenakshi Ammal
3. Sellammal
4. Seeniammal ... Petitioners

-Vs-

Malayammal ... Respondent

Revision under Section 115 of C.P.C. against the Order dated 18-03-2
003 made in I.A. No. 8 of 2002 in A.S. No. 275 of 2002 on the file
of the Additional District Court at Namakkal.

!For Petitioners : Mr. Valliappan
for M/s. Sarvabhauman Associates

^For Respondent : ---

:ORDER

The Plaintiffs 2 to 5 in the suit are the petitioners herein. The Plaintiffs have filed the suit O.S. No. 728 of 1987 before the Additional District Munsif, Namakkal for declaration and injunction. Before the trial court, both the plaintiffs and defendant have let in oral and documentary evidence. After considering the same, the trial court dismissed the suit. Aggrieved by the judgment and decree passed by the trial court, the petitioners herein have preferred A.S. No. 275 of 2002. Pending appeal, the petitioners have filed I.A. No. 8 of 20 02 under Order 23 Rule 1 (3) CPC seeking permission of the Court to withdraw the suit with liberty to file a fresh suit on the same cause of action. After affording opportunity to both sides, the first Appellate Court dismissed the application, which is challenged in this revision.

2. Mr. Valliappan, learned counsel appearing for the petitioners submitted that the first Appellate Court erred in dismissing the application filed under Order 23 Rule 1 (3) CPC without following the principles

enunciated therein; that the Court below failed to note that the respondent herein claims title from one Pachaiyammal, wife of Marudhamuthu Udayar and the petitioners herein claim title from Pachaiyammal, Wife of Subbaraya Udayar and the identity in the names of Predecessors in title of both parties was not clarified properly in the suit; that because of the technical omission stands in the way of proper appreciation of points in issue, the petitioners were constrained to file the petition under Order 23 Rule 1 (3) CPC to withdraw the suit with the view to avoid formal defect and for making proper submission and prayed for setting aside the order passed by the first Appellate Court.

3. The learned counsel appearing for the petitioners relied on the decision of this Court reported in (Esanya Madalayam Religions Institution owned by Koviloor Muthuramalingam Gnana Desigar Madalayam, rep. by its Madathipathi Sri-la-Sri Nachiappa Gnanadesiga Samigal Vs. Thiruvannamalai Sevasramam Educational Trust, rep. by its Secretary Dr. B. Subbarayan) 1999 MLJ Volume 2 Page No.360.

In this case, the plaintiff has filed two suits against the defendants for permanent injunction, when the defendants are in possession. The Plaintiff intended to file a comprehensive suit after withdrawing the earlier suits. This Court held that though in the absence of formal defect, if there is sufficient grounds or cause to withdraw the suit, hence leave could be granted by the Court.

4. This revision lies in a narrow campus. The petitioners have filed the application under Order 23 Rule 1 (3) CPC seeking permission of the Court to withdraw the suit and to file a fresh suit for the very same cause of action. Order 23 Rule 1 (3) CPC runs as follows:-

"1. Withdrawal of suit or abandonment of part of claim

(3) Where the Court is satisfied-
(a) that a suit must fail by reason of some formal defect, or
(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms, as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim."

5. Under Clause (b) of Order 23 Rule 1 (3), suit can be withdrawn with a liberty to sue afresh on sufficient grounds. The expression " sufficient grounds" must be read 'ejusdem generis' with clause (a) and a ground to be sufficient ground must be similar or alike to the cause mentioned in Order 23 Rule 1 (3) (a).

6. No doubt, a Court of appeal has power in a proper case to grant permission to withdraw a suit with liberty to file a fresh suit, however, such power should be used very cautiously by a Court of appeal. The Plaintiff/appellant is not entitled, as a matter of right to withdraw his suit and he will not be permitted to do so if the effect of allowing him to

withdraw it would be to deprive the defendant of the benefit of the lower court's adjudication in his favour.

7. The granting of the permission to withdraw with liberty to bring a fresh suit removes the bar of resjudicata which would otherwise apply, if a fresh suit on the same cause of action is brought. Clause (3) contemplates the circumstance in which the permission could be granted by the Court on its satisfaction namely (i) a suit must fail by reason of formal defect and (ii) there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim.

8. Formal defect means a defect of form, which is prescribed by Rules or Procedure. A defect which goes to the root of the plaintiff's claim is not a formal defect. The formal defect may be omission to obtain permission of Court to file the suit, misjoinder of parties or cause of action, failure to disclose cause of action for the Plaint, erroneous valuation of the subject matter of the suit and institution of a suit in a Court which has no jurisdiction to entertain it.

9. The other sufficient ground is that the defect must not be due to plaintiff's own fault, hence the expression 'other sufficient ground' should be construed 'ejusdem generis' with formal defect. The failure of the plaintiff to prove his own case is no ground for allowing him to withdraw his suit with liberty of suing again for the same subject matter.

10. The object of the Rule is not to enable a plaintiff, after he failed to conduct his suit with proper care and diligence and after his witnesses failed to support his case, to obtain an opportunity of commencing the trial afresh in order to avoid the result of his previous bad conduct of the case so as to prejudice the opposite party.

11. The sufficient grounds are like the evidence being not available for no fault of the plaintiff, the suit being pre-matured and the cause of action accruing pending the suit, the plaintiff has failed to put in evidence an important document and where the plaintiff had been mislead by the absence of a specific denial by the defendant.

12. After satisfaction, the Court may grant permission. The matter of granting permission under this Rule is within the discretion of the Court. The Court, when granting permission under this Rule must give its reason for granting such permission, although in the case of refusal there is no such obligation.

13. In this case, the petitioners herein wants to withdraw the suit on the ground that the respondent claims her title under a sale deed said to have been executed by one Pachiammal, wife of Marimuthu Udayar, who is no more and the petitioners herein claim their title and possession from one Pachiammal, wife of Subbaraya Udayar and that the identity of the names between two different person was not clarified properly in the suit by the lower court, hence they want to withdraw the suit as this technical omission stands in the way of enquiry of the appeal. The appellate Court found that

both parties trace their title and possession of the suit property by producing so many documents, adducing oral evidence before the trial court and on the basis of the evidence by which the trial court decided the right of the parties and if the petition is allowed as prayed for, it will affect the vested right of the respondent herein and ultimately dismissed the application to withdraw the suit.

14. The respondent relied on the decision of the Supreme Court reported in (Rathinavel Chettiar Vs. Sivaraman) 1999 II CTC Page No.593 before the lower Appellate Court wherein it was held that withdrawal of suit at appellate stage having effect of destroying or nullifying the decree affecting the rights of the parties vested under the decree cannot be allowed as a matter of course and such withdrawal can be allowed only when a strong case is made out. The said decision of the Honourable Supreme Court, relied on by the respondent before the lower Appellate Court is squarely applicable to the facts and circumstance of the case.

15. As mentioned supra, the Rule is not to enable the Plaintiffs after they fail to conduct the suit with proper care and diligence, hence the lower appellate Court is right in dismissing the application to withdraw the suit. The decision relied on by the counsel for the petitioner is not applicable to the facts and circumstance of the case on hand. Therefore, interference of this Court is unwarranted.

16. With the result, the revision fails, liable to be dismissed and accordingly dismissed. No costs. Connected CMP is closed. What are all stated above need not be taken into account by the appellate Court at the time of deciding the appeal on merits.

17. The learned counsel appearing for the petitioner prays this Court to observe the right of the petitioners herein to approach the appellate Court for adducing additional evidence. Such an observation may not be required. In case such a petition is filed, it is for the appellate Court to decide the same on its own merits and in accordance with law.

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Index : Yes
Internet : Yes

To
The Additional District Judge
Additional District Court

?IN THE HIGH COURT OF JUDICTURE AT MADRAS

%Dated: 16/09/2003

*Coram

The Honourable Mr. Justice V.S. SIRPURKAR
and
The Honourable Mr. Justice P.D. DINAKARAN

+W.P. No.21071 of 2003
and W.P.Nos. 21072 to 21075 OF 2003

#S. Mohammed Ali ..... Petitioner

-Vs-

$1. The State of Tamil Nadu
rep. by Secretary to Government
Public (SC) Department
Fort St. George
Chennai 600 009

2. The Commissioner of Customs
Airport, Chennai 600 027

3. Union of India, rep. by its
Secretary, Ministry of Finance
Department of Revenue
New Delhi ..... Respondents

Petitions under Art.226 of the Constitution of India, praying for a Writ of Certiorarified Mandamus as stated in the petitions

!For Petitioner :: Mr. K. Subramaniam, S.C.
for Mohammed Shafi

^For Respondents :: Mr. I.Subramaniam,
Public Prosecutor/S.C.
assisted by
Mr. A. Navaneethakrishnan
Addl. Public Prosecutor

:ORDER

V.S. SIRPURKAR, J.

All the above-mentioned five writ petitions shall be disposed of by this common judgment.

2. Petitioner herein seeks to quash the orders passed by the respondents dated 25-4-2003 and 15-2-2001 whereby the pre-detention

representations of the petitioner were rejected. By the first order, the petitioner's representation dated 17-6-2002 was dealt with while, by the second mentioned order, the subsequent four representations dated 7-7-2002, 9-8-2002, 25-9-2002 and 22-10-2002 were disposed of. These representations were made by the petitioner praying therein that a detention order dated 15-2-2001 passed under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short 'COFEPOSA') should not be executed and should be cancelled. Following facts will highlight the controversy involved in these unusual writ petitions.

3. Petitioner, who claims to be a lawyer, holds a licence as an accredited overseas recruiting agent, which licence is granted by the Ministry of Labour, Government of India. Petitioner has been holding this licence right from 1984. He was intercepted at Anna International Airport, Chennai on 10-12-2000, when he was on his way to Malaysia. He claimed that he was going there in pursuance of his business and that on 11th and 12th December, he had sent sixty workers to Malaysia for the purpose of employment. He claimed that he was carrying the amount of those sixty persons and thus he was carrying with him US$1 1700 in the denominations of US$100s, US$50s and US$20s. This amount was obviously not declared by him and he was therefore arrested by the officials of the Enforcement Wing. He was also charged with an offence under Sec.135-1A of the Customs Act and was put behind the bars. He claims that on this basis, an order for his detention came to be passed under COFEPOSA.

3.1. He did not wait for being served with the order of detention, which was tried to be served upon him and approached this Court vide W.P. No.3212 of 2001 on 16-2-2001. An interim order of status quo came to be passed in the said writ petition on 20th April 2001. Needless to mention that in the meantime, the respondents could not nab him. Ultimately, the writ petition came to be decided on 5-6-200 2, whereby the writ petition was dismissed relying on the reported decision of the Supreme Court in Government of India v. Alka Subash Gadia (1992 Supp. (1) 496). The Division Bench (Jagadeesan and Murugesan, JJ.) gave a categorical finding therein that the petitioner's case did not fall under any of the eventualities contemplated under the decision of Alka Subash Gadia, cited supra, so as to enable him to move a writ petition even before the order of detention was served against him. The Division Bench also took notice of the latter decisions of the Supreme Court in SAYED TAHER BAWAMIYA v. JOINT SECRETARY (2000 [8] SCC 630) and UNION OF INDIA v. MUNEESH SUNEJA (2001 [3] SCC 92) and came to the conclusion that the writ petition was liable to be dismissed. It was also observed by the Bench, relying on UNION OF INDIA v. PARASMAL RAMPURIA (1998 [8] SCC 402) that the petitioner was bound to surrender before the petition could be entertained.

3.2. However, in the last paragraph of the judgment, the Division Bench observed that it was open to the petitioner to make a representation after the receipt of the order of the High Court to the concerned authority and that such representation was bound to be considered as to whether the order of detention had to be implemented in view of the lapse of time by taking into consideration the subsequent conduct of the petitioner coupled with his explanation offered for possession of foreign and Indian currency while he was bound to leave India. This judgment was delivered on 5-6-2002.

However, the petitioner was not arrested. The petitioner, accordingly, made the first representation on 17-6-2002. He also made four other representations on 7 -7-2002, 9-8-2002, 25-9-2002 and 22-10-2002.

3.3. These five representations were considered and rejected by the order dated 27-11-1002. However, the said order of rejection was challenged in W.P. No.44378 of 2002 on the ground that the order of rejection was not a speaking order. The Division Bench of this Court again passed an order on 30-1-2003, directing the respondents to consider the first representation alone on the ground that they had directed the petitioner to file only one representation. Accordingly, on 25-4-2003, the first representation dated 17-6-2002 was rejected.

3.4. Before this, the Government had challenged the first order of the Division Bench by way of a Special Leave Petition but, that was dismissed in limine. After the rejection of the representation, the petitioner filed a writ petition under Art.32 of the Constitution, which was registered as W.P.(Crl.) No.90 of 2003. This was disposed of by order dated 23-6-2003. The petitioner also filed S.L.P. No.2219 of 2003 against the decision of this Court dated 30-1-2003 wherein, this Court had directed to decide only the first representation of the petitioner, ignoring the subsequent four representations made by him. This Special Leave Petition and W.P. No.90 of 2003 came to be disposed of on 23-6-2003. The Supreme Court therein observed that the part of the High Court□s order directing the respondents not to consider the petitioner□s subsequent four representations could not be sustained. The Court directed the first respondent to dispose of the said four representations also and further directed that the order of detention should not be executed till the disposal of the four representations. As regards the writ petition filed by the petitioner, i.e. W.P. (Crl.) No.90 of 2003, the Supreme Court directed the petitioner to withdraw the said writ petition with liberty to move the High Court in the event of an occasion arising for that purpose.

3.5. On 17-7-2003, the respondents passed separate orders and rejected the petitioner□s four subsequent representations. Now the petitioner has come up by way of the present writ petitions challenging those orders by which, the respondents have rejected the representations. In the present writ petitions, the petitioner has claimed a Writ of □Certiorarified Mandamus□ for quashing the orders of rejection and for forbearing the respondents from executing the order of detention dated 15-2-2001 passed by the respondents.

4. Learned senior counsel, Shri K. Subramaniam, appearing on behalf of the petitioner, contended before us that all these orders were liable to be quashed and the respondents were bound to cancel the detention order passed owing to the towering delay in execution of the detention order. Learned counsel contended that the live-link between the incident, on which the detention was based, and the necessity to detain the petitioner was already snapped because of this towering delay and that the respondents were in error in not realising this.

5. Learned counsel also fell back on the first order of this Court wherein, the writ petition of the petitioner was dismissed and canvassed that this Court had specifically directed to taken into consideration the subsequent conduct of the petitioner before considering the representations

made by him and that the orders were silent about the said subsequent conduct. Learned counsel pointed out that there was nothing done by the petitioner contrary to law so as to attract the provisions of the COFEPOSA. It was also tried to be urged that there was total apathy on the part of the authorities to nab the petitioner though the petitioner was not protected by the stay order either from this Court or from the Apex Court and, there was absolutely no explanation regarding the same. This itself suggested that there was, in reality, no necessity by the Department to clamp the detention order against the petitioner. It was also tried to be suggested that there was no material furnished for the subjective satisfaction of the concerned authority regarding the necessity of executing the order. Learned counsel also urged that the detention was based on solitary incident and as such could not be justified in law and that the authorities had failed to consider this aspect while disposing of the representations.

6. As against this, leanred Additional Public Prosecutor again reiterated the decisions of Alka Subash Gadia, Sayed Taher Bawamiya, Muneesh Sunerja and Parasmal Rampuria, cited supra. It was pointed out by the learned Public Prosecutor that the writ petitions now could not be entertained questioning the correctness or otherwise of the reasons given by the respondents to reject the representations. It was pointed out by the learned Public Prosecutor that what was actually being done by the petitioner was to challenge the detention order itself as if the detention order was not only passed but served also. Learned Public Prosecutor based his arguments mainly on the theory that what was contemplated under Art.22(5) of the Constitution was a representation, which was of post-detention nature, and that there was no scope to make the representation even before the order of detention was passed or as the case may be served upon the detenu. Learned Public Prosecutor urges that the representations made by the detenu could not be treated on par with the representation contemplated under Art.22(5) of the Constitution complaining against the detention. According to the learned Public Prosecutor, a writ petition was permissible only to the extent as stated in the above-mentioned four Supreme Court judgments and more particularly Alka Subash Gadia case, which law was fossilised by the Supreme Court in Muneesh Suneja case, cited supra. Learned counsel pointed out that thereafter there was no change in the law at all.

7. On this backdrop, it has to be seen as to whether the petitioner can successfully challenge the impugned orders dated 25-4-2003 and 17-7-2003. All these orders were separately passed, considering the petitioners representations individually. A cursory glance at the individual orders passed by the respondents, rejecting the representations, suggests that not only have the authorities considered these representations in detail but, have given equally detailed reasons for arriving at the conclusions that they did. The orders are in the nature of parawise remarks and it is pointed out in all the orders that it was the petitioner who was to be blamed for not being nabbed in time. When we take into consideration the first order dated 17-7-2003 in respect of the second representation dated 7-7-2002, the authorities have explained as to why the order could not be executed against the petitioner. They have also categorically denied the claim of the petitioner to revoke the detention. There can be no doubt that the petitioner had a right under Sec.11 of COFEPOSA. However, in view of the language of

Sec.11 that a detention order could at any time be revoked or modified, there does not appear to be any scope to hold that the pre-detention representations were not possible to be made at all. Perhaps, bearing this in mind, this Court in its first judgment had held that if it was felt, the detenu could make the representations and that those representations were bound to be considered by the detaining authority.

8. During the whole debate, learned counsel for the petitioner did not assail the orders on their merits questioning the reasons given to reject the representations. The main thrust of the argument was that firstly the order, if made, was illegal and that the fact that the order was passed in 2001 and was not served for more than three years was sufficient for the authorities to revoke the said order or rather to put it straight, the authorities were bound to revoke the said order, considering the towering delay. We have to, therefore, consider mainly as to whether it is now possible to question those reasons by way of a writ petition and what would be the scope of the writ petition and whether it would be permissible to examine the reasons and to hold on that basis that the detention order was not justified or that the said detention order should be revoked.

9. There is a common thread in all the orders that the detention order against the petitioner could not be executed for two reasons, viz. firstly, due to petitioner□s concealment and secondly, the orders passed by this Court and the Supreme Court wherein there was a clear-cut injunction against the respondents to execute the detention order. We are of the clear opinion that the scope to consider such a petition would be extremely limited and that this Court would not and could not go into the correctness or otherwise of the reasons. In our considered opinion, this Court will desist from going into the □ merits□ of the reasons, atleast at this stage, when the detention order is not even served on the detenu and when the detenu has not surrendered and when the liberty of the detenu has not been jeopardised.

10. In K.M. ABDULLA KUNHI AND ABDUL KHADER v. UNION OF INDIA (AIR 1991 SC 574), the Apex Court considered the necessity of the reasons rejecting the representation. In paragraph 19 of the said judgment, the Apex Court observed as follows:
□This has been explained in Hardhan Saha case, AIR 1974 SC 2154, where Ray, C.J. speaking for the Constitution Bench observed that the consideration of the representation by the Government is only to ascertain whether the detention order is in conformity with the power under the law. There need not be a speaking order in disposing such representation. There is also no failure of justice by the order not being a speaking order. All that is necessary is that there should be real and proper consideration by the Government.
Going strictly by these observations, when we see the impugned orders, it is obvious that the impugned orders are not only reasoned but, a meticulous care has been taken to meet each and every point raised in the representations. There has thus been an □active□ consideration of the representations sent by the petitioner in all the cases. It will not be for this Court to judge as to whether the authorities could still serve the order of detention which is already passed earlier. A glance at the impugned order suggests that the

concerned authority has blamed the petitioner for evading the order and has reiterated the need to serve the order and thereby reiterating the need to detain the petitioner. Once there is an "active" consideration of the representations, that should be the end of the matter because, it will not be for this court then to go and find out whether those reasons are sufficient for the detaining authority to hold that the detention is still necessary. In our opinion, that stage has not arrived yet at all.

11. In the reported decision in UNION OF INDIA AND OTHERS v. PARASMAL RAMPURIA (1998 8 SCC 402), the situation was somewhat alike. There also even before the detention order could be served, a writ petition came to be filed before the High Court. Initially, an injunction restraining the service of the order came to be passed by the learned single Judge and thereafter by the Division Bench. Aggrieved by the interim order passed by the Division Bench, the detaining authority challenged the same before the Apex Court. The Apex Court observed as follows:
"When the writ petition was filed, the respondent had not surrendered. Under these circumstances, the proper order which was required to be passed was to call upon the respondent first to surrender pursuant to the detention order and then to have all his grievances examined on merits after he had an opportunity to study the grounds of detention and to make his representation against the said grounds as required by Article 22(5) of the Constitution of India."
The Apex Court ultimately vacated the interim orders passed by the Division Bench which were continued throughout for the period of two years and directed the prospective detenu to surrender and observed that after surrendering, it would be open to him to amend the writ petition and to take all permissible legal grounds to challenge the detention order. The Apex Court went on to set aside all the extension orders by which the interim relief was extended.

12. This only goes on to suggest the approach of the Apex Court in these matters, which approach had already been settled in Muneesh Sunerja case, cited supra where the Apex Court had the occasion to examine the law laid down in Alka Subash Gadia case as also Sayed Taher Bawamiya case. This was also a case where a writ petition was filed even when the detention order was not served. The Apex Court reiterated the five principles laid down in Alka Subash Gadia case, cited supra and held that the writ petition was not to be treated as a writ for Habeas Corpus but like any other ordinary writ petition. The Apex Court further observed:
"This Court has been categorical that in the matters of predetention cases interference of court is not called for except in the circumstances setforth by us earlier. If this aspect is borne in mind, the High Court of Punjab and Haryana could not have quashed the order of detention either on the ground of delay in passing the impugned order delay in executing the said order. That mere delay either in passing the order of detention or executing thereof is not fatal except where the same stands unexplained."

13. The situation is absolutely identical here. For whatever reasons, there has undoubtedly been a delay in serving the detention order. The impugned orders do suggest that those reasons have not only been reiterated but justified by the authorities also. Explanations have been

given in those orders themselves as to why the detention order was not or could not be served against the detenu. As observed in the law laid down by the Apex Court, it would not be for this Court to quash the detention order, which is already passed but could not be served on the petitioner on the ground that there has been delay in serving that order on the detenu. We have already pointed out that that has been practically the mainstay of the argument of Mr. K. Subramaniam, who very forcibly suggested that the delay in executing the orders became fatal. He relied on the reported decision of the Division Bench of this Court, to which one of us (V.S. Sirpurkar, J.) was a party, in RAJESWARI v. JOINT SECRETARY TO GOVERNMENT OF INDIA, MINISTRY OF FINANCE, NEW DELHI AND ANOTHER (2000 (III) CTC 97). That was a case where the detention order was passed after five and a half months and it was based on a single incident of seizure of gold bars. It was found by the Division Bench that since no effort was taken by the investigating agency in the meantime, the detention order suffered from illegality and that the life-line between the incident and the detention order was snapped. Learned counsel tried to urge before us that in this case also, since the detention order has been passed three years back but has not been served on the detenu, there would be no point in now allowing the said order to be served. We do not agree. We have already given our reasons as to why such a plea could not be raised at this stage in the light of the observations made in Parasmal Rampuria case and Muneesh Suneja case, cited supra.

14. Heavy reliance was placed by the learned counsel on the unreported decision of the Division Bench of this Court in W.P. No.5737 of 1 990, which was delivered on 17-2-1992, where the learned Judges considered the question of delay in executing the order of detention. We have already pointed out that much water under the bridge has flown after this decision and we find ourselves unable to agree with this decision on account of the law settled down in Muneesh Suneja case, cited supra. The Division Bench of this Court had quashed the detention order by a Writ of Mandamus. We have already discussed as to how on the mere question of delay, it would be possible for the High Court to quash the detention order. We are also unable to follow as to how for quashing an order of detention, which was yet not served, a Writ of Mandamus could be issued. But, there will be no question of considering all that in view of the subsequent decisions of the Apex Court.

15. Learned counsel also relied on the reported decision in SUNIL FULCHAND SHAH v. UNION OF INDIA (JT 2000 [2] SC 230) and relied on the following observations in paragraph 18:
"The question whether or not the detenu should be made to surrender to undergo the remaining period of detention would depend upon a variety of factors and in particular on the question of lapse of time between the date of detention, the order of the High Court and the order of this Court, setting aside the order of the High Court. A detenu need not be sent back to undergo the remaining period of detention after a long lapse of time when even the maximum prescribed period intended in the order of detention has expired, unless there still exists a proximate temporal nexus between the period of detention prescribed when the detenu was required to be detained and the date when the detenu is required to be detained pursuant to the appellate order and the State is able to satisfy the court about the desirability of " further" or

□continued□ detention.□
In our opinion, these observations have been made by the Apex Court in entirely different situation. There the High Court had allowed the writ petition filed by the detenu and quashed the detention order. The Apex Court had, however, set aside the order of the High Court and was, therefore, considering as to whether the detenu was liable to be put behind the bars for the remainder of the detention period as ordered in the detention order. Such is not the situation here. We have already pointed out that the jurisdictional constraints, which are spelt out by the earlier decisions, are rather compulsive for us not to consider any such plea.

16. Another decision relied upon by the learned counsel is RAJESH GULATI v. GOVERNMENT OF N.C.T. OF DELHI AND ANOTHER (JT 2002 [6] 331). This was a case where the detention was directed though the detenu□ s passport was retained by the Customs authorities. A plea was, therefore, raised that under the circumstances, there was no possibility of the detenu engaging himself in any prejudicial activity and as such, the conclusion drawn by the detaining authority was baseless. The Apex Court in paragraph 15 came to the conclusion that since none of the instances of the smuggling by the appellant, as stated in the impugned detention order, describe the appellant as having travelled without a passport for the purpose of smuggling, the conclusion drawn by the detaining authority was based on no material. Learned counsel tried to heavily rely on this judgment and suggest that in the present case also, there was no question of the petitioner□s engaging in any smuggling activity. In our opinion, this judgment has no relevance with the controversy involved in the present case. We, therefore, reject the contention.

17. It was then tried to be suggested that this was a solitary incident in which the petitioner was involved and, therefore, the petitioner should not be allowed to be detained now. For this purpose, the reported decision in CHOWDARAPU RAGHUNANDAN v. STATE OF TAMIL NADU AND OTHERS (2002 SCC (Cri.) 714) was relied upon. In our opinion, for the reasons that

we have given, it is futile for us to go into the merits of the detention order at this stage. Therefore, this contention of the learned counsel is also rejected.

18. It was tried to be argued that a detention order is not □ punitive□ in nature and should not be used as a □warrant□. For this purpose, a few decisions were cited before us. We have absolutely no difficulty in accepting this. However, suffice it to say that it is not established in this case that this detention order has been treated as a □punitive□ order or as a □warrant□. The authorities have insisted in their orders that the detention order needs to be served even now. In their orders rejecting the representations, the authorities have again and again reiterated the need to execute the detention order. Paragraphs 4 and 5 of the order dated 17-7-2003, in reply to the representation dated 25-9-2002, are sufficient to suggest the application of mind on the part of the authorities.

19. In short, this is a case where the petitioner, who claims to be a lawyer and who also claims to be holding a permit for doing business

of arranging manpower to work in Malaysia (we do not know how is it permissible for a lawyer to do such business) has successfully thwarted the orders, so much so, that the authorities have not been able to nab him even when there were no stay orders either by this Court or by the Apex Court. Taking the advantage of the last paragraph of the first Division Bench judgment, the petitioner fired representations after representations and thereby skirted his arrest. We are not at all happy with the way the Department has treated the whole affair. We fail to follow as to why the petitioner who has a permanent address and who claims to be a lawyer could not be served with the detention order. In fact, the learned counsel for the petitioner had reiterated before us that the licence of the petitioner has again been renewed which suggests the good behaviour on the part of the petitioner after the detention order was passed. In our opinion, the renewal of the licence is completely irrelevant in so far as the controversy in this case is concerned. We, however, record our utter dissatisfaction for the way the matter of arrest of the petitioner has been treated by the department. However, we do not find any merit in the writ petitions. The writ petitions are dismissed.

Index:Yes
Website:Yes
Jai

To:

1. Secretary to Government
Public (SC) Department
State of Tamil Nadu
Fort St. George
Chennai 600 009
2. The Commissioner of Customs
Airport, Chennai 600 027
3. Secretary to Government
Ministry of Finance
Department of Revenue
New Delhi
4. The Public Prosecutor
O/o Public Prosecutor
High Court Buildings
Chennai

Learned senior counsel for the petitioner, after declaration of the judgment, made an oral application under Art.134(1)(c) for leave to file an appeal against the instant order before the Supreme Court under Art.134A(b) of the Constitution of India on the ground that this case is a fit one for appeal to the Supreme Court. Learned counsel also suggests that the question falling in here is involving the substantial question of law as to the interpretation of the Constitution.
2. We have already given our reasons as to why we are not

agreeing with the contentions raised by the learned counsel. We do not see any reason to grant the leave. Leave is rejected.

Jai